Table of Contents.

Opinion below	2
Jurisdiction	2
Question presented	2
Statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	6
1. This case presents a major question as to whether the answers to a tainted hypothetical question can constitute a "fact" within the context of "a basis in fact" standard of review of a conscientious objection claim, and whether an armed service can deny conscientious objection status to an applicant when the sole "basis in fact" for that denial lies in the answers to a tainted hypothetical question	6
2. The United States Court of Appeals for the First Circuit sidestepped the issue of whether "a basis in fact" determination can be solely based on the petitioner's responses to a flawed or tainted hypothetical question	8
Conclusion	11
Appendix A	13
Appendix B	19
Appendix C	31

Table of Authorities Cited.

CASES.

Bates v. Commander, First Coast Guard District, 413 F. 2d 475 (1st Cir. 1969) 7, 8
Clay v. United States, 403 U.S. 698 (1971) 7
Estep v. United States, 327 U.S. 114 (1946) 7
Gillette v. United States, 401 U.S. 437 (1971) 7, 10
United States v. Berg, 310 F. Supp. 1157 (D. Me. 1970) 8
United States v. Curry, 410 F. 2d 1297 (1st Cir. 1969) 8
United States v. Downer, 139 F. 2d 761 (2d Cir. 1944) 8
United States v. Haughton, 413 F. 2d 736 (9th Cir. 1969) 8
Witmer v. United States, 348 U.S. 375 (1955) 8

STATUTES.

United States Constitution
First Amendment 9
Fifth Amendment 9
28 U.S.C. § 1254(1) 2
50 U.S.C. App. § 456(j) 2, 3, 7

In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No.

LT. ALVIN A. ROSENFELD, M.D.,
PETITIONER,

v.

REAR ADMIRAL RICHARD E. RUMBLE ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, Lt. Alvin A. Rosenfeld, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 23, 1975.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit, the court below, No. 75-1011, May 25, 1975, is not yet reported but is attached hereto (Appendix "A"). The opinion of the District Court is reported at 386 F. Supp. 476 (D. Mass. 1974) (Appendix "B"). The opinion of the United States Magistrate is given in Appendix "C".

Jurisdiction.

The judgment of the court below was entered on May 23, 1975, and this petition was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether an armed service can, as a matter of law, use an applicant's answer to a tainted hypothetical question as the sole basis in fact for denying that appellant a discharge as a conscientious objector.

Statutory Provisions Involved.

This case is brought under the provisions of 50 U.S.C. App. § 456(j), which provides in pertinent part:

"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to *participation in war in any form.*" (Emphasis supplied.)

Statement of the Case.

Petitioner Rosenfeld, a lieutenant in the Medical Corps of the United States Naval Reserve, obligated to two years of active duty upon completion of his residency in psychiatry, joined the Navy Berry Plan in March of 1971, during his year of internship following graduation from medical school.

Having concluded that he was conscientiously opposed to all war by reason of religious training and belief, petitioner filed, by registered mail, an exhaustive application for discharge from the Navy as a conscientious objector on February 28, 1973, this application being 70 pages in length with 21 appended letters of recommendation, all attesting to petitioner's complete sincerity, including two from rabbis, one from a history professor, eleven from professional colleagues, and a number of letters from close friends and family members.

On March 29, 1973, petitioner was interviewed by a single Navy chaplain, whose function it was to determine the depth, sincerity and sources of the applicant's religious training and belief in connection with his request for classification as a conscientious objector. On the basis of this interview, the Navy chaplain recommended favorable consideration of his request.

On March 30, 1973, petitioner was interviewed by three Navy psychiatrists at the Boston Navy Hospital at Chelsea, Massachusetts, in contravention of Naval regulations (BUPERS-

NOTE 1900, October 8, 1971, § 8), which call for an informal psychiatric interview by one psychiatrist solely to determine the question of the applicant's sanity. The only relevant finding of this irregularly constituted psychiatric panel was that the applicant suffered from no mental disorder, and that "The mental status examination was essentially within normal limits for a man of his background and station in life." Additionally, it should be noted that the psychiatric board could find no reason whatsoever to doubt the applicant's sincerity and credibility, a matter which was properly outside the lawful scope of the examination, but which was raised by the board nevertheless.

On May 24, 1973, the petitioner appeared with counsel and a stenographer and had a hearing, as provided for by Naval regulations, before Capt. Ralph C. Copeland, JAG, USNR, hearing officer, at Headquarters, First Naval District, Boston, Massachusetts. The hearing was also transcribed by a Naval stenographer, and became part of the official record on appeal. The hearing officer concluded that "applicant is a sensitive, well educated, intelligent individual who has a high regard for human rights, human life, and concern for his fellow man," and accepted, "by and large, the applicant's sincerity insofar as it is relevant to the question that his beliefs, whatever they be, are in his own scheme of things religious in nature." The hearing officer, however, found that applicant was not "conscientiously opposed to participation in war in any form" and recommended that the application be denied.

The hearing officer's report was forwarded on July 11, 1973, together with petitioner's application, letters of recommendation and reports of the psychiatric consultation and interview with the Navy chaplain, to the Commandant for the First Naval District. The Commandant endorsed, re-addressed and forwarded the application to the Office of Chief of Naval Personnel, on August 31, 1973, appending thereto his own

report in which he concurred in the hearing officer's recommendation of disapproval of petitioner's application. The Commandant upheld the hearing officer's view that petitioner "does not hold a sincere objection to participation in war in any form or to the bearing of arms."

On September 28, 1973, petitioner's application was denied by the Chief of Naval Personnel, Department of the Navy, Bureau of Naval Personnel, Washington, D.C. A copy of this determination was duly forwarded to and received by petitioner. The Chief of Naval Personnel's sole reason for rejecting the applicant's claim was that the applicant "[is] not opposed to participation of any kind in war in any form."

Petitioner, having exhausted all administrative remedies available within the Navy, filed a petition for the issuance of a writ of habeas corpus in the United States District Court for the District of Massachusetts.

On July 18, 1974, petitioner was heard before Magistrate Princi, who issued on August 28, 1974, a memorandum and order recommending the case be transferred to the United States District Court, concluding that "there is a serious question as to whether there is a 'basis in fact'" for the finding of the hearing officer "in view of the totality of the record, the briefs and arguments of counsel" (Appendix "C," pp. 52-53).

Based on the recommendation of the United States Magistrate, petitioner's cause was submitted on brief to the United States District Court, Freedman, J., who issued an opinion and order dated December 10, 1974, dismissing petitioner's application for a writ of habeas corpus, holding that "the Navy had a basis in fact and in law to deny the petitioner's application" for discharge as a conscientious objector (Appendix "B," p. 30).

Petitioner promptly appealed to the United States Court of Appeals for the First Circuit which, on May 23, 1975, affirmed the decision of the District Court (Appendix "A"),

concluding that the Navy had a "basis in fact" for denying petitioner discharge as a conscientious objector.

Petitioner therefore has brought this application for a writ of certiorari before the United States Supreme Court.

Reasons for Granting the Writ.

1. This Case Presents a Major Question as to Whether the Answers to a Tainted Hypothetical Question can Constitute a "Fact" within the Context of "a Basis in Fact" Standard of Review of a Conscientious Objection Claim, and Whether an Armed Service can Deny Conscientious Objection Status to an Applicant when the Sole "Basis in Fact" for that Denial Lies in the Answers to a Tainted Hypothetical Question.

Petitioner argued in the United States Court of Appeals for the First Circuit that respondents lacked a "basis in fact" for their denial of conscientious objection status to petitioner, in that the sole alleged "basis in fact" consisted of one or two answers to a tainted hypothetical question. Petitioner argued that the hypothetical question was tainted because it contained prejudicial matter, was confusing, ambiguous, irrelevant, and had been refuted by testimony at five other points in the official Navy transcript of the May 24, 1973, hearing. Petitioner argued that the Navy should not, as a matter of law, be allowed to use the answers to such a tainted hypothetical question to provide the sole "basis in fact" for denial of petitioner's application for discharge as a conscientious objector.

The standard of review courts are to give to administrative determinations by the armed forces and selective service boards as to selective service classification and conscientious

objection status cases has been said to be "whether 'a basis in fact' exists for the classification given." *Bates* v. *Commander, First Coast Guard District*, 413 F. 2d 475, 477 (1st Cir. 1969), citing *Estep* v. *United States*, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946). The standards for determining claims of in-service objectors are the same as the standards applicable to selective service cases. *Gillette* v. *United States*, 401 U.S. 437, 91 S. Ct. 828 (1971). In order to deny petitioner's claim of conscientious objector status, the Navy had to make "a basis in fact" showing that at some point petitioner did not comply with the three-pronged test set out by this Court for determining conscientious objector status in *Clay* v. *United States*, 403 U.S. 698, 91 S. Ct. 2068 (1971), namely, that this or any other claimant for conscientious objector status must show that he is:

(1) conscientiously and sincerely

(2) opposed to war in any form

(3) based on religious training and belief.

While petitioner concedes that the stringent "basis in fact" standard admits of the use of answers to hypothetical questions to establish the particular fact in some circumstances, petitioner contends that the answer to an unclear, improper, misleading, prejudicial or irrelevant hypothetical question (a "tainted" hypothetical question) should not alone, as a matter of law, be enough to provide any kind of "fact" for a "basis in fact" determination by an armed service. Neither petitioner nor respondents have been able to discover a case from this Honorable Court, or any other court, in which the term "basis in fact" is defined or illustrated with any degree of exactitude. The question of just what constitutes a "basis in fact" is one of first impression and therefore of great importance to the administration of justice and to litigants under the relevant provisions of 50 U.S.C. App. § 456(j), the Military Selective Service Act. Petitioner respectfully submits that whatever this Court or any other court decides the meaning and composition

of the term "basis in fact" might be, one thing that it is certainly not is several answers to a flawed or tainted hypothetical question. Since the issue of the meaning of the term "basis in fact" has come up in many jurisdictions, although not precisely in the form presented here, see, *e.g.*, *Witmer* v. *United States*, 348 U.S. 375, 75 S. Ct. 392 (1955); *United States* v. *Curry*, 410 F. 2d 1297 (1st Cir. 1969); *United States* v. *Downer*, 139 F. 2d 761 (2d Cir. 1944); *United States* v. *Haughton*, 413 F. 2d 736, 739 (9th Cir. 1969); *United States* v. *Berg*, 310 F. Supp. 1157 (D. Me. 1970); *Bates* v. *Commander, First Coast Guard District, supra*, and since the law of conscientious objection is entirely of the federal jurisdiction, petitioner submits that it is very important that the United States Supreme Court decide the issue presented by this case in order to remedy the continuing need to bring clarity and precision to this area of the law.

2. The United States Court of Appeals for the First Circuit Sidestepped the Issue of Whether "A Basis in Fact" Determination can be Solely Based on the Petitioner's Responses to a Flawed or Tainted Hypothetical Question.

In an otherwise thoughtful and well reasoned opinion (Appendix "A"), the Court of Appeals for the First Circuit sidestepped the "basis in fact" issue, preferring instead to rely on the discussion of the matter in the opinion of the District Court. (Appendix "A," p. 14). While the learned District Court judge identified the relevant authorities as to the standard of review (Appendix "B," pp. 23-24), he did not in any way deal with or define just what it is that constitutes "a basis in fact" and whether or not a tainted hypothetical question could constitute one. Instead, he concluded from the record

that the Navy had not only "a basis in fact" but a "substantial basis" on which to base its denial of petitioner's claim for conscientious objector status (Appendix "B," p. 24). In this conclusion, the opinion of the learned District Court judge differed markedly from the findings of the United States Magistrate who first heard the case (Appendix "C," p. 52). The disagreement between the magistrate and the district judge over how much "basis in fact" was in fact present indicates that the question of whether or not there was even "a basis in fact" for the Navy's determination is not as clear cut as the district judge's opinion would have one believe, and all this without even considering the central issue of whether, as a matter of law, answers to a tainted hypothetical question can form a "basis in fact."

The hypothetical question which gave rise to this present appeal is set out in the opinion of the District Court (Appendix "B," p. 21) and the opinion of the United States Magistrate (Appendix "C," p. 48). On appeal to the Court of Appeals for the First Circuit, petitioner argued that the hypothetical was flawed or tainted in that it:

(1) contained matter prejudicial to the petitioner's First and Fifth Amendment rights and tending to punish him in his free exercise thereof;

(2) was confusing and ambiguous, and tended to elicit a confusing and ambiguous answer from petitioner which neither the government nor petitioner's counsel had been able sufficiently to clarify;

(3) was irrelevant in that the question on genocide by an aggressive foreign invader did not further illuminate whether petitioner was "sincerely and conscientiously opposed to participation in war in any form based on religious training and belief"; and

(4) was effectively refuted by petitioner's testimony on pages 29, 32, 33, 35 and 36 of the official Navy transcript of petitioner's May 24, 1973, hearing.

Taken separately or as a totality, petitioner respectfully submits that the above four objections are enough on their face to cast grave doubt on the ability of a few responses to such a question to form a "basis in fact," and fatally to taint or flaw not only the hypothetical question but these same responses flowing from it.

In its learned opinion, the Court of Appeals for the First Circuit noted that "[w]e are aware of the atmosphere of unreality created by hypothetical questions. Yet the Congressional mandate of 'participation in war in any form' leaves no alternative to probing." (Appendix "A," p. 17.) This Court, also, has indicated, at least inferentially, that hypothetical questions, and the answers to them, are not always reliable guides for providing "a basis in fact" determination in a conscientious objector case.

> "Somewhat more apposite to the instant situation are cases dealing with persons who oppose participating in all wars, but cannot say with complete certainty that their present convictions and existing state of mind are unalterable. [Citation omitted.] Unwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the claimant's present sincerity of belief." *Gillette* v. *United States*, 401 U.S. 437, 448, 91 S. Ct. 828 (1971).

Petitioner contends that the time has come for this Court to provide closer definition of the "basis in fact" standard, and to deal with the issue raised by petitioner as to whether or not several answers to a tainted or flawed hypothetical question can provide, as a matter of law, a "basis in fact" for a determination by one of the armed services that a petitioner has

failed to comply with the criteria for establishing conscientious objector status.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

MITCHELL BENJOYA,
CHARLES L. FIELD,
ZISSON & BENJOYA,
18 Tremont Street,
Boston, Massachusetts 02108.

Appendix A.

United States Court of Appeals
For the First Circuit

No. 75-1011

LT. ALVIN A. ROSENFELD, M.D.,
PETITIONER, APPELLANT,

v.

REAR ADMIRAL RICHARD E. RUMBLE, ET AL.,
RESPONDENTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[386 F. Supp. 476]

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Charles L. Field, with whom *Mitchell Benjoya*, and *Zisson & Benjoya* were on brief, for appellant.

Marshall D. Stein, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellees.

May 23, 1975

COFFIN, *Chief Judge*. Appellant, a Lieutenant in the Medical Corps of the United States Naval Reserve obligated to two years of active duty upon completion of his residency in psychiatry, seeks discharge by a writ of habeas corpus on conscientious objector grounds. The only issues raised by the Navy's refusal to grant his application for discharge concern its determination that appellant's response to questions posed by a hearing officer indicated that he was not opposed to participa-

tion in war in any form. Appellant is of Jewish upbringing and faith, and has been profoundly influenced by his understanding of the holocaust of atrocities perpetrated against Jews by the Nazi regime. In answer to hypothetical questions, he took the position that he would personally bear arms, though not in a military unit, if a foreign nation crossed the territorial boundaries of this nation, having the avowed purpose of exterminating all Jews.

The magistrate concluded that this response established a prima facie case that appellant would fight only in defense of himself or his family and that therefore the burden lay on the government to refute the claim. He recommended that the issue not be determined on the government's motion to dismiss. The district court, after oral argument and on the basis of pleadings and the relevant portions of the record of proceedings before the Navy hearing officer, held that the Navy's determination had a basis in fact and granted the motion to dismiss.

On this issue of basis in fact there is little reason to try to repeat in detail what the district court said in its thoughtful opinion. 368 F. Supp. 476 (D. Mass. 1974). It accurately set forth the essential facts and identified the relevant authorities as to the standard of review. It appropriately noted that *Gillette* v. *United States*, 401 U.S. 437, 448 (1971), recognized an area of permitted resort to force, without sacrifice of conscientious objector status, for those who would fight "in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community." As the court observed, such limitations in both time and geographic area are objective, not subjective criteria. Nor does *Sicurella* v. *United States*, 348 U.S. 385 (1955), with its recognition that a willingness to fight spiritual wars with non-carnal weapons does not destroy the status of conscientious objector,

help appellant. His willingness extends to a secular war and carnal weapons.

That appellant would not fight as a member of the armed services seems to us, as it did to the district court, not persuasive. As the government pointed out in its brief, the early resolution of the Continental Congress in 1775[1] and the first draft act of 1863[2] spoke in terms of those who were conscientiously opposed to bearing arms. That the term "participate in war in any form" was intended to carry on the same meaning was explicitly stated in debate on the Selective Service Act of 1917,[3] which became the precursor to the contemporary provision.

We add only this observation to the district court's opinion. We are not insensitive to the genuineness of appellant's feeling that he would look upon an invader bent on extinguishing his co-religionists in this country as an immediate threat to his "family", extended and nuclear. There is recent history to back him up. But if exemption is given appellant for this reason, must not it also be given a Mormon, a Seventh Day Adventist, or to hark back to the Crusades, any professed Christian, if the invader be "infidel"? These hypothetical cases are of course quickly distinguished by their lack of verisimilitude—they are fantasies, whereas the holocaust was real. The existence of such an historical background is highly relevant on the issue of sincerity. But to allow it to be used to define the parameters of a person's family or community, so that fighting in defense of the country can be equated with defense of self and family, seems to us an irrational basis for distinction. For example, a

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[1] Journals of the Continental Congress, 1774-1789 Vol. II 1775 at p. 189. Government Printing Office 1905.

[2] United States Statutes at Large, Vol. 13, p. 6 at p. 9.

[3] Congressional Record, Vol. 55, Part 1, 65th Congress, 1st Session, Senate, April 24, 1917, pp. 1004-1005.

patriotic humanist, believing in no God but deeply believing that the nation is his "family", would not, despite the intensity of his view of community, be entitled to his definition for purposes of qualifying as a conscientious objector.[4] We therefore conclude with what we said in a slightly different context in *United States* v. *Curry*, 410 F. 2d 1297, 1299 (1st Cir. 1969), "Were appellant to be granted relief from the military burden on the basis of his stated views as to the occasions when wars should be fought, the statutory standard would have been effectively eviscerated."

An issue not addressed to the district court has been put to us on appeal: whether the questions asked appellant violated the First and Fifth Amendments. The contention is that the injection into hypothetical questions of the assumption that a foreign invader would be bent on extermination of all Jews placed an unfair burden on appellant. Appellant calls these "loaded" questions. While we are not obligated to deal with this new issue, we do so in view of its nature. For if we were convinced that appellant had been lured by trickery on to treacherous ground, we would not take refuge in a procedural shelter. And it may well be that the effort to imagine honestly one's response to the hypothetical situation described is unique for a group that had in recent history a real experience. Had the hearing officer devised the question out of thin air, that is, just because appellant was of Jewish background and faith, we would be troubled. But a substantial, if not the major, thrust of appellant's seventy-page application for discharge was directed to his reflections over the enormity of the Nazi persecutions. Under these circumstances it was natural for the

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[4] Indeed, appellant is not insensible to the position of those who, though opposed to war generally, would, out of love of country alone, take up arms in its defense. He argues that "government policy for too long has penalized conscientious objectors for their patriotism." Such an argument, however, is clearly foreclosed by the authorities. *E.g.*, *Gillette*, *supra*.

hearing officer to refer to this background in exploring the position of appellant. We are aware of the atmosphere of unreality created by hypothetical questions. Yet the Congressional mandate of "participation in war in any form" leaves no alternative to probing. Our view of the record reveals no indication of perverse imagination or exploitation by the hearing officer. Indeed, counsel for appellant pursued the same line of inquiry, obviously deeming it both relevant and fair at the time.

Affirmed.

Appendix B.

United States District Court
District of Massachusetts

LT. ALVIN A. ROSENFELD, M.D.	)	
	)	
v.	)	Misc. Civil
	)	No. 74-27-F
REAR ADMIRAL RICHARD E. RUMBLE, Commandant, First Naval District, VICE ADMIRAL DAVID H. BAGLEY, Chief, Bureau of Naval Personnel, and JAMES M. SCHLESINGER, Secretary, Department of Defense	)	

Opinion and Order.

December 10, 1974

FREEDMAN, D.J.

Respondents' substitute motion to dismiss is before the Court in response to a petition for a writ of habeas corpus which seeks an order of the Court compelling the respondents to discharge the petitioner from the United States Navy Reserve as a conscientious objector.

This matter was heard by a magistrate who made a recommendation arising from his findings of fact and conclusions of law. Nevertheless, in light of the recent Supreme Court ruling in *Wingo* v. *Wedding*, 94 S. Ct. 2842 (decided June 26,

1974), the Court is constrained to make its own findings with respect to the motion.

On November 4, 1974, the Court heard a brief oral argument from the respondents. Evidently, the petitioner was content to rest on the pleadings and the record, given the fact that the parties have agreed by stipulation that the record is complete and that the relevant portions of the record are pages 12-17 and page 35 of the transcript of a May 24, 1973 hearing before Naval Commander Ralph C. Copeland.

The petitioner, Dr. Alvin A. Rosenfeld, is a resident of Massachusetts who is licensed to practice medicine in this Commonwealth. He is currently a Lieutenant in the Medical Corps of the United States Naval Reserve, having enrolled in March of 1971 in the Armed Forces Physician's Appointment and Residency Program (hereinafter referred to as the "Berry Plan"). The Berry Plan is a non-compensating deferred entrance program for physicians who enter specialty residence training. Under the plan, Dr. Rosenfeld was held in a reserve status pending the completion of his residency in psychiatry after which he was to perform two years of active duty in the Navy beginning in the Summer of 1974.

On February 28, 1973, the petitioner, while a member of the Berry Plan, filed a lengthy application for discharge from the Navy on the grounds that he conscientiously objected to all war. Attached to the application were 21 letters attesting to the sincerity of the applicant.

On May 24, 1973, Dr. Rosenfeld appeared with counsel for a hearing before Cmdr. Ralph C. Copeland, Judge Advocate General's Corps, United States Naval Reserve, at the Navy Law Center, Headquarters, First Naval District, Boston, Massachusetts. At the hearing the petitioner was questioned at great length about his beliefs pertaining to his application for conscientious objector status. As a result of the applicant's statements at the hearing, Cmdr. Copeland recom-

mended that the application be denied because it was his opinion " . . . that the applicant ha[d] not sustained the burden of proving that he is opposed to participation in war in any form under all circumstances." Report of hearing officer regarding application for discharge from the Naval Reserve as a conscientious objector in the case of Lt. Alvin Rosenfeld, July 11, 1973, p. 3.

Since the Navy's refusal to grant the petitioner's application stems directly from certain statements made by Dr. Rosenfeld at the hearing, it would be useful at this juncture to quote some of the relevant portions of the transcript.

> "Cmdr. Copeland: Well, let's assume that tomorrow a war breaks out in which Russia attacks — let's assume that Russia commences a policy of a violent, forceful, external, geographical expansion which involves the use of arms. All right? And let's assume that in this policy of forceful expansion they embark upon a policy of extermination of all Jews. Would you bear arms against the aggressor?
>
> "Dr. Rosenfeld: If Russian troops landed on the shores of San Francisco — I am an American and, if attacked and — by a clear, definite enemy where there is no choice and no question that another human being is threatening me, my family, I would then bear arms." (Transcript, p. 14)
>
> . . . . . .
>
> "Cmdr. Copeland: At some point, I take it from your answer, you would bear arms?
>
> "Dr. Rosenfeld: If the physical shores of the country were attacked — if there were a clear, visible enemy — if my life and my family's lives were threatened." (Transcript, p. 15)

"Cmdr. Copeland: . . . You've indicated that at some point you would [bear arms]. And you indicated, if they [Russians] landed in San Francisco on the territorial soil of the United States, you would — I think your indication was that you would at that point consider . . . bearing arms. Now I'm asking you on what basis are you relying on this distinguishment of position based upon artificial national boundaries, where the policy remains the same and it could be geographically conceivably closer to your home and your family, even though it is not in the territorial soil of the United States?

"Dr. Rosenfeld: Well, I believe that I can only bear arms when myself or my family is physically put in danger; and I think that is at the territorial boundaries of my country." (Transcript, p. 16)

. . . . . .

"Cmdr. Copeland: In the hypothetical I gave you, let's assume that the country being aggressed against is the United States of America. Based upon your prior testimony, is it fair to say you would have no hesitation in participating in the armed services? In some capacity.

"Dr. Rosenfeld: Can you specify what you mean by 'the country being aggressed against is the United States'?

"Cmdr. Copeland: The other country is using the armed force.

"Dr. Rosenfeld: Does that mean the troops would be landing?

"Cmdr. Copeland: Yes.

"Dr. Rosenfeld: Yes, I would defend myself.

"Mr. Benjoya, attorney for the petitioner: Would you be in the military?

"Dr. Rosenfeld: No. But I would defend myself." (Transcript, p. 35)

On August 31, 1973, the Commandant of the First Naval District, specifically referring to some of the petitioner's statements set out above, concurred in Cmdr. Copeland's conclusion that "Dr. Rosenfeld does not hold a sincere objection to participation in war in any form or to the bearing of arms." First Endorsement on Cmdr. Ralph C. Copeland by the Commandant, First Naval District, August 31, 1973, p. 2. He therefore endorsed the hearing officer's recommendation that the petitioner's application be denied.

The petitioner's application was then forwarded to the Chief of Naval Personnel who, on September 28, 1973, further concurred in the decision to deny conscientious objector status to the petitioner. After citing some portions of the transcript set out above, the reviewing officer stated:

> "3. A class I-O conscientious objector is a person who by reason of conscientious objection sincerely objects to participation of any kind in war in any form. It is apparent from the record that you are conscientiously opposed to participation in the armed forces. Similarly, it is readily apparent that you are not opposed to participation of any kind in war in any form, because you have stated that you would participate as a combatant in a defensive war against an armed aggressor." Decision of the Chief of Naval Personnel on the status of Lt. Alvin A. Rosenfeld in the U.S. Naval Reserve, Sept. 28, 1973, p. 2.

It is this last denial of the petitioner's application, from the highest Naval appellate administrative office, that is the subject of this petition for a writ of habeas corpus.

Before getting to the issue before the Court, some mention must be made of the standard of review used in this type of case. In *Bates* v. *Commander, First Coast Guard District,*

413 F. 2d 475 (1st Cir., 1969), the Court of Appeals stated: "On review of a selective service classification the sole question for the court is whether 'a basis in fact' exists for the classification given. *Estep* v. *United States*, 327 U.S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946). The scope of our review is no less restrictive in the case of those who claim conscientious objection after entering the military service. (Citations omitted.)" 413 F. 2d at 477. *See, Gillette* v. *United States*, 401 U.S. 437, 442 (1971).

Other courts have referred to this type of review as the "narrowest known to the law." *Blalock* v. *United States*, 247 F. 2d 615, 619 (4th Cir., 1957). *See, Cohen* v. *Laird*, 315 F. Supp. 1265, 1271 (D. S.C., 1970), aff'd., 439 F. 2d 866 (4th Cir., 1971). Thus, if there was any factual basis in the record which would support the decision of law made by the Naval authorities, this Court cannot disturb that decision. *United States* v. *Daniel*, 462 F. 2d 349 (9th Cir., 1972). *See, Silberberg* v. *Willis*, 420 F. 2d 662, 665 (1st Cir., 1970).

The Court finds that the Navy had not only a basis in fact, but a substantial basis, to find the following with respect to the petitioner's views on his participation in war:

(1) The petitioner would bear arms to defend himself and his family if the United States were invaded by a foreign aggressor.

(2) The petitioner's participation in such a war would be on an individual basis only and not as a member of the armed forces.

(3) Such individual action by the petitioner would not necessarily be in response to aggressive acts committed in the immediate vicinity of the petitioner's residence.

Congress has set forth, in 50 App. U.S.C. § 456j, the standard whereby a person shall be adjudged to be a conscientious objector. This section provides:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to *participation in war in any form.*" 50 App. U.S.C. § 456j, (emphasis added).

The Supreme Court has interpreted this statute to require an applicant to satisfy a threefold test before he can be classified as a conscientious objector. "He must [first] show that he is conscientiously opposed to war in any form. (Citation omitted.) [Second,] [h]e must show that this opposition is based upon religious training and belief . . . [Finally,] . . . he must show that this objection is sincere." *Clay* v. *United States*, 403 U.S. 698, 700 (1971).

It is not contended that the petitioner does not satisfy parts two and three of the test stated in *Clay*. The sole question here is whether the Navy had a "basis in fact" to refuse conscientious objector status to the petitioner for failure to satisfy the first part of the Clay test. Put more specifically, is the petitioner "conscientiously opposed to war in any form" if he is willing, in the event of an invasion of the United States by a foreign aggressor, to bear arms individually to protect himself and his family even though such an invasion is not in physical proximity to the petitioner's family residence?

The petitioner argues that his views fall within the purview of a long line of cases[1] beginning with *Sicurella* v. *United States*, 348 U.S. 385 (1955), which, he contends, support the proposition " . . . that one does not have to be a pacifist to be a conscientious objector, and that a belief in the use of force in self-defense and in defense of family, home, co-religionists, ministry or faith, will not act as a bar or disqualification to conscientious objector status." Memorandum in Support of Petition for the Issuance of a Writ of Habeas Corpus, p. 14. While these cases may indeed support this proposition, the petitioner's reliance on them is misplaced because his views are clearly at odds with every case in which an exemption was given to an applicant who expressed a willingness to perform acts in defense of self or others.

"Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such. *See*, e.g., *United States* v. *Haughton*, 413 F. 2d 736, 740-742 (9th Cir., 1969); *United States* v. *Carroll*, 398 F. 2d 651, 655 (3rd Cir., 1968)." *Gillette* v. *United States*, *supra*, at 448.[2] Yet it should be stressed that all

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[1] *Kretchet* v. *United States*, 284 F. 2d 561 (9th Cir., 1960); *Mayfield* v. *United States*, 220 F. 2d 729 (5th Cir., 1955); *Moon* v. *United States*, 220 F. 2d 730 (5th Cir., 1955); *United States* v. *Lauing*, 221 F. 2d 425 (7th Cir., 1955); *Shepherd* v. *United States*, 220 F. 2d 855 (9th Cir., 1955); *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir., 1958).

[2] *Accord*, *United States*, *ex rel. Greenwood* v. *Resor*, 439 F. 2d 1249 (4th Cir., 1971); *United States* v. *Davila*, 429 F. 2d 481 (5th Cir., 1970); *United States* v. *James*, 417 F. 2d 828 (4th Cir., 1969).

of these defensive acts imply a sense of physical and personal immediacy. Cf., *Gillette* v. *United States, supra,* at 448. That immediacy must be tested by objective, rather than subjective, criteria. Thus, the petitioner's belief that he, as a resident of Massachusetts, would be acting in self-defense by bearing arms during an invasion of San Francisco by an armed aggressor is irrelevant to this Court's determination of his claim of self-defense. On the other hand, the objective fact that he would bear arms in such a situation is crucial to the rejection of his claim because such a fact is geographically incompatible with a claim of self-defense or defense of family, home, or community.

The petitioner's reliance on *Sicurella* and its progeny seems to be an effort to read into those cases a judicial expansion of the geographical limits of self-defense to include defensive acts performed to protect an extended group with which one is affiliated. Yet after a reading of these cases, it is apparent that such an expansion was not intended.

In *Sicurella,* the petitioner was a Jehovah's Witness who was willing to fight a theocratic war in " . . . defense of his ministry, his brethren, and Kingdom interests . . . " 348 U.S. at 389. His participation in this war would be expressly limited to the use of spiritual, rather than carnal, weapons.

In holding that the applicant was entitled to conscientious objector status, the Supreme Court, per Mr. Justice Clark, stated:

> "As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that

> the yardstick of the Congress includes within its measures such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.
>
> We believe that Congress had in mind real shooting wars when it referred to participation in war in any form — actual military conflicts between nations of the earth in our time — wars with bombs and bullets, tanks, planes and rockets." *Id.* at 390-391.

Thus the underlying rationale of *Sicurella* was that it was unrealistic to equate a willingness to fight in a theocratic war without carnal arms[3] to a willingness "to participate in war in any form." 50 App. U.S.C. § 456j. In contrast, Dr. Rosenfeld has stated that he would bear carnal arms if this country were being invaded by a foreign power. Such participation would certainly be in an "actual military conflict between nations of the earth in our time." *Id.* at 391.

The focus in *Sicurella* is upon those acts which the applicant would perform, and not upon the whereabouts of those persons he would defend. The geographical limits of self-defense were not discussed. The implication is that defense of religious brethren is conceptually different from either self-defense or defense of family, home, and community. Furthermore, even if *Sicurella* could be read to support the contention

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[3] In all of the cases cited in footnote 1, *supra*, the applicants were willing to use carnal weapons in a theocratic war. Nevertheless, the courts granted conscientious objector exemptions to each one on the grounds that these cases could not be meaningfully distinguished from *Sicurella*. Thus the *Sicurella* case, as interpreted by these courts, stands for the proposition that if an applicant will fight in a theocratic war only, he is entitled to an exemption. This line of interpretation has, of course, no bearing on the instant case because the petitioner would fight in a secular war.

that one may be entitled to conscientious objector status despite a willingness to act in defense of a group which he is affiliated with, the petitioner has not shown that he would bear arms in defense of any such group.

Finally, the petitioner's statement to the effect that he would bear arms individually if this country were invaded by a foreign aggressor runs afoul of the Supreme Court's decision in *Gillette* v. *United States, supra.* In *Gillette,* both petitioners specifically objected to the war in Vietnam. Yet the petitioner Gillette " . . . stated his willingness to participate *in a war of national defense* or a war sponsored by the United Nations as a peace-keeping measure . . . " *Id.* at 439. [Emphasis added.]

Since "objection to a particular war" necessarily includes "[a] virtually limitless variety of beliefs,"[4] *Id.* at 455, the Court felt that " . . . real dangers . . . might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations." *Id.* at 460. Therefore, the Court concluded that an objector to a particular war does not qualify under the relevant statute for a conscientious objector exemption.

In this case, the petitioner would fight in a defensive war waged on American soil. This is almost the exact situation contemplated in *Gillette.* Furthermore, it makes no difference in this Court's mind whether his participation would be on an individual or group basis. History is replete with actions of persons, acting individually, who have waged war. The test is whether an individual is "opposed to participation in war in any form," 50 App. U.S.C. § 456j, and not whether he is opposed to fighting in a group.

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[4] Included under the varied beliefs which can form an "objection to a particular war" is a desire to only fight in a defensive war in a certain place. *See, Gillette* v. *United States, supra,* at 455, n. 211.

Consequently, for the foregoing reasons, this Court holds that the Navy had a basis in fact and in law to deny the petitioner's application for a conscientious objector status. Therefore, the respondents' substitute motion to dismiss petitioner's writ of habeas corpus is allowed. So ordered.

FRANK H. FREEDMAN
United States District Judge

Appendix C.

United States District Court
District of Massachusetts

LT. ALVIN A. ROSENFELD,
PETITIONER,

v.

RICHARD E. RUMBLE, ET AL,
RESPONDENTS.

CIVIL ACTION No. 74-27-F

MAGISTRATE'S No. 14-2; 74-99

Memorandum, Finding and Recommendation
on
(Respondents') Substitute Motion to Dismiss

August 28, 1974

PRINCI, U. S. M.

This matter was heard by me on July 18, 1974. Mitchell Benjoya, Esq., represented the petitioner and Marshall D. Stein, Esq., Asst. U.S. Attorney, represented the respondents.

The respondents filed "Respondents' Motion to File a Substitute Motion to Dismiss" on July 17, 1974. This Court allowed this motion without objection. Excellent briefs were filed by both counsel.

In light of *O'Shea* v. *United States*, 491 F. 2d 774 (1st Cir. 1974) and *Wingo* v. *Wedding*, 94 S. Ct. 2842 (decided June 26, 1974), this Court recommends that the District Judge rehear this motion and an independent finding be made by him; as this matter was referred to me prior to the *Wingo* decision.

Facts

This petition was brought pursuant to Title 28, U.S.C. § 2241 (power to grant Writs of Habeas Corpus) and Title 28, U.S.C. § 1361, which provides that the District Court shall have original jurisdiction of any action in the nature of mandamus of a felon, officer, or employee of the United States or agency thereof to perform a duty owed to the plaintiff, and Title 28, U.S.C. § 1391, the jurisdictional provision. Clearly, there is jurisdiction in this Court. *Carney* v. *Laird*, 462 F. 2d 606 (1st Cir. 1972).

Briefly, the petitioner is a Lieutenant in the Medical Corps, United States Navy Reserve, having formally participated in the Armed Forces Physicians' Appointment and Residency Program ("Berry Plan"). The Berry Plan is a non-compensating deferred entrance program for physicians who enter specialty residence training. The petitioner is presently completing his residency in psychiatry, and is scheduled to enter active duty in the summer of 1974.

He applied for "Conscientious Objector Status" (C.O.S.) while a member of the Berry Plan, to the Navy, in this Commonwealth on February 28, 1973. On July 11, 1973, after hearing on May 24, 1973, before Commander Ralph C. Copeland ("Copeland"), JAGC, USNR-R, his application for C.O.S. was denied (Exhibit "A" attached hereto). On appeal to the Commandant of the First Naval District, Copeland's finding was affirmed on August 31, 1973 (Exhibit "B" attached hereto). On September 28, 1973, petitioner's application was denied by the Chief of Naval Personnel (Exhibit "C" attached hereto).

Petitioner's Contentions

The petitioner contends:

1. That the Commandant upheld a hearing officer's view that the petitioner "does not hold a sincere objection to participation in war in any form or to the bearing of arms".

2. That such conclusion is contradicted by overwhelming evidence, is unsupported by the record, and has no basis in law or fact.

3. That the Chief of Naval Personnel's sole reason for rejecting the applicant's claim was that he determined from the record that the applicant "is not opposed to participation of any kind in war in any form". This denial, therefore, is based on the supposition that the petitioner would "participate as a combatant in a defensive war against an armed aggressor", and that this would disqualify the petitioner as a Conscientious Objector ("C.O.").

4. That the Chief of Naval Personnel's denial of applicant's claim is based on a misreading of the record, as well as a misunderstanding of the law on this important point and runs directly counter to prevailing case law on the subject. In addition, the supposition upon which it is based is conjectural.

5. That the Chief of Naval Personnel is the highest appellate administrative officer in the Navy and therefore, the petitioner has completely exhausted all administrative remedies.

6. That the petitioner should be discharged from the United States Naval Reserve as a C.O.

7. That there is a common denominator question here of the religious beliefs of Jews, Italians, and others (Tr. 12), for in Judiac law, petitioner has a religious conviction which is part of his claim for C.O.

8. That the Court must read the petitioner's whole state ment and words should not be taken out of context.

Respondent's Contentions

The respondents contend:

1. That the petitioner is willing to be a combatant if the United States was invaded, therefore, he is a "Selective Conscientious Objector" ("S.C.O.") and would not qualify as a C.O. under the statute.

2. That with respect to this aspect of the claim, the finding by Copeland is substantiated by the colloquy at Tr. 14, 15.

3. That the only fair inference is that the petitioner, by his own statements, would bear arms and if the Court believes this, then his statements are contradictory and the respondents have sustained their findings.

4. That this conclusion falls within the finding in *Gillette* v. *United States*, infra, where Gillette objected to a particular war, "a defense or invasion", and it was held that there cannot be S.C.O. status, and the administrative finding was sustained.

5. That the petitioner cannot say "I would defend myself" for the real question is, "is he a theological objector and does he come within the *Sicurella* opinion?", infra.

6. That there was no basis in fact in the petitioner's application for discharge as a C.O. and that the provisions of Navy Regulations, "Bupers Note 1900" of October 8, 1971, relating to petitioner's application for discharge were complied with in petitioner's application. (Bupers Note 1900 is a regulation that prevents an applicant from claiming discharge based solely on conscientious objection which existed, but was not claimed, prior to induction).

7. That the Chief of Naval Personnel rendered the final decision in this matter on September 28, 1973 and the petitioner was so informed. He concluded that the petitioner was not "opposed to war in any form" because the petitioner had

stated he would participate as a combatant in a defensive war against an armed aggressor.

8. That there was ample evidence to support the Navy's conclusion that the petitioner would bear arms if the physical shores of this country were attacked, therefore, he was not a C.O. within the meaning of Title 50, App. U.S.C. § 456j.

Stipulations

The parties agreed:

1. That the relevant portions of the record are page 12-17 and page 35 of the transcript.

2. That no evidentiary hearing is necessary as the record is complete and on the basis of the record, petitioner claims he is entitled to relief.

3. That the parties are not offering this transcript as an official record because petitioner insists that page 18 should also be included in the record, but the respondents object to that inclusion.

Principal Question Presented

The principal question here is to determine whether the record substantiates the finding of the Navy that the applicant was not "conscientiously opposed to participation in war in any form". Also, whether it is necessary in order to establish C.O.S., an applicant must be "opposed to war in any form".

The Board's conclusion is apparently based on the fact that petitioner does not hold a sincere objection to war in any form, for petitioner has stated in his interview before the hearing officer that he would participate as a combatant in a defensive war against an armed aggressor.

In brief, therefore, the question is "Can a person be classified as a C.O., if that person believes in resorting to self-defense when he, his family, or home are severely and immediately threatened by an armed aggressor?"

Selective Service Act of 1967

Title 50 App. U.S.C. § 456j relates to the instant matter inasmuch as conscientious objection in the Army is governed by the same standards as the Selective Service Act, which in pertinent part provides:

> "Nothing contained in this Title . . . shall be construed to require any person to be subject to combatant training service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientious *opposed to participation in war in any form.*" (Emphasis supplied)

A registrant's belief in use of force in self-defense is consistent with a conscientious objection to participation in war in any form. *Pitts* v. *United States*, 217 F. 2d 590 (9th Cir. 1954); *United States* v. *Gearey*, 379 F. 2d 915 (2d Cir. 1967), cert. denied 88 S. Ct. 335, 389 U.S. 959, rehearing denied, 88 S. Ct. 561, 389 U.S. 1010. A registrant, sincere in his conscientious objection to participation in war, but with willingness to kill in self-defense would not prevent his classification as a C.O.

One need not be a total pacifist to qualify for a C.O. discharge, but need only be opposed to war in any form; and for such purpose, organized violent overthrow of the government constitutes "war" in some form, but once petitioner has

made prima facie showing he qualifies for C.O. Status, it is defendant's burden to refute his claim. *Silverthorne* v. *Laird*, 460 F. 2d 1175 (5th Cir. 1972).

To qualify for a C.O., one's religious beliefs need not lead inexorably to C.O. and it is enough if one has religious faith and by reason of faith, is opposed to participation in all wars. *Bates* v. *Commander, First Coast Guard District*, 413 F. 2d 475 (1st Cir. 1969).

Crystallization of Conscientious Objector Status

It is not unreasonable to require a registrant to exercise at least a minimum amount of diligence in his own interests with respect to a claim for C.O.S. as required by a valid regulation providing that claim must be made before registrant receives his induction notice unless his entitlement to that status did not mature until afterwards. *United States* v. *Walker*, 424 F. 2d 1069 (1st Cir. 1970), cert. denied 91 S. Ct. 1673, 402 U.S. 985.

The fact that one first asserted his claim of conscientious objection shortly after he received his orders for six months assignment in Guam did not provide basis in fact for finding that his objection to war was merely selective. *Soloman* v. *Seamans*, 331 F. Supp. 1099 (D.C. Mass. 1971).

The lateness of a claim of C.O. cannot be the sole ground for denial of such claim, *United States* v. *Bellafiore*, 332 F. Supp. 1060 (D.C. Pa. 1971); and the claim of conscientious objection is to be viewed by the same standards whether made before or after entering the military service. *McMahan* v. *Laird*, 320 F. Supp. 485 (D.C. Cal. 1970); *Weber* v. *Inacker*, 317 F. Supp. 651 (D.C. Pa. 1970).

Point in time in which registrant brings facts concerning his C.O. status to attention of Local Board, even if it be after

issuance of order to report for induction, is not, in and of itself, sufficient for Board's refusal to reopen the registrant's classification though the timing may be a relevant factor in determining sincerity of the claim. *Murray* v. *Vaughn*, 300 F. Supp. 688 (D.C. R.I. 1969).

Pertinent Rules and Law

In a motion to dismiss, facts must be taken as true in the light most favorable to the plaintiff. *Dunn* v. *Gazzola*, 216 F. 2d 709 (1st Cir. 1954).

The scope of judicial review in this matter is limited only to *whether there was a basis in fact* for finding that the petitioner was not a C.O., but Navy regulations must be followed scrupulously. *United States ex rel Brooks* v. *Clifford*, 409 F. 2d 700 (4th Cir. 1969) and *Bates* v. *Commander, First Coast Guard District*, supra. The standards for determining claims of in-service objectors are the same as the tests applicable in a pre-induction procedure. *Gillette* v. *United States*, 401 U.S. 437, 91 S. Ct. 828 (1971).

In determining the qualifications as a C.O., the following tests have been established and applied in *Clay* v. *United States*, 403 U.S. 698, 91 S. Ct. 2068 (1971):

(1) The objector must show he is "opposed to war in any form".

(2) That his opposition is based upon religious training and belief.

(3) That his objection is conscientious and sincere.

See also: *Kretchet* v. *United States*, 284 F. 2d 561 (9th Cir. 1960); *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958).

It would appear from the record and from the arguments of counsel that the petitioner qualifies under Nos. 2 and 3. The only question then to be resolved is No. 1.

The Court, in *United States* v. *Seeger*, 380 U.S. 163, 85 S. Ct. 850 (1965), said at page 183 with reference to the application of the tests:

> "We recognize the difficulties that have always faced the trier of fact in these cases. We hope that the test that we lay down proves less onerous. The examiner is furnished a standard that permits consideration of criteria with which he has had considerable experience. While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?
>
> "Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. Recognition of this was implicit in the language cited by the *Berman* court from *State* v. *Amana Society*, 132 Iowa 304, 109 N.W. 894 (1906):
>
> > "Surely a scheme of life designed to obviate [man's inhumanity to man], and by removing temptations, and all the allurements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotees regard it as an essential tenet of their religious faith." 132 Iowa, at 315, 109 N.W., at 898, cited in *Berman* v. *United States*, 156 F. 2d 377, 381."

"The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be

> tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States* v. *Ballard*, 322 U.S. 78, 86 (1944); "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."

If there is a basis in fact for the Navy's conclusion, and the Court should find there is conflicting evidence, where two inferences could be drawn from the same testimony, it cannot hold that the decision lacks a basis in fact. *United States* v. *Haughton*, 413 F. 2d 736 at 739 (9th Cir. 1969); *Witmer* v. *United States*, 348 U.S. 375, 75 S. Ct. 392 (1955).

In *United States* v. *Downer*, 139 F. 2d 761 (2d Cir. 1944), which involved one lapse on the part of the defendant with respect to conscientious objection, in that he, on a fluke, took an eye test, the Court sustained the finding of the Government Board because the finding of fact could be considered either way, even though the Court indicated it would not have ruled that way itself. The Court accepted the finding because it could not say that the Board's decision was arbitrary and capricious or that it lacked all legality. See also: *Frey* v. *Larsen*, 448 F. 2d 811 at 814 (9th Cir. 1971) which held that if demeanor evidence was considered, it must show in the record in the fact finder's determination.

First Circuit Cases

United States v. *Ford*, 478 F. 2d 169 (1st Cir. 1973), cert. denied 414 U.S. 872. In *Ford*, the defendant was only

opposed to the Vietnam war. The Court said at page 173 with reference to Title 50 App. U.S.C. § 456j:

> "In order to meet these standards, a registrant must be opposed to war in any form, *Gillette* v. *United States*, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971), on the basis of 'religious training and belief' as that term has been construed in *United States* v. *Seeger*, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965) and *Welsh* v. *United States*, 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 309 (1970) . . . Nowhere in any of the documents submitted to the local board in support of his claim was there a clear statement of his opposition to war in any form. . . . While his counsel has attempted to portray several of his isolated statements in his Form 150 as indicating a possibly universal opposition to war, we think that the form, read as a whole, presents an absolutely clear instance of selective conscientious objection."

In *United States* v. *Ferraioli*, 480 F. 2d 987 (1st Cir. 1973) the Court recognized that if an objector was willing to participate in a "real shooting war" then he could not be classified as a C.O., under the *Clay* test.

In *Bates* v. *Commander, First Coast Guard District*, 413 F. 2d 475 (1st Cir. 1969), the Court said at page 477:

> "On review of a selective service classification the sole question for the court is whether 'a basis in fact' exists for the classification given. [citations omitted]. The scope of our review is no less restrictive in the case of those who claim conscientious objection after entering the military service. [citations omitted].

At page 478, the Court said:

> "It is well established that even under the 'no basis in fact' test, doubt as to the sincerity cannot be predicated on mere speculation."

In *United States* v. *Curry*, 410 F. 2d 1297 (1st Cir. 1969), the Court held that the Local Board had a "basis in fact" where the Selective Service registrant expressed not only ambiguity but candid uncertainty as to what he would do if the United States were attacked.

United States v. *Berg*, 310 F. Supp. 1157 (D. Me. 1970), held that the Courts are not "super draft boards" substituting their judgments on the weight of the evidence for those designated agencies, nor would the Court look for substantial evidence to support such determinations; the classification can be overturned only it is has no basis in fact and found for the defendant.

Pertinent Statutes

Title 28, U.S.C. § 1361 which confers on the District Court original jurisdiction of any action in the nature of mandamus to compel any officer or employee of the United States or its agency to perform a duty owed to the plaintiff, authorizes issuance of a writ when a government official fails to comply with a specific statutory or regulatory direction or acts beyond any rational exercise of his discretion or delegated power, in violation of a duty owed to the plaintiff. *Leonhard* v. *Mitchell*, 474 F. 2d 709 (2d Cir. 1973), cert. denied 93 S. Ct. 3011, 412 U.S. 949; however, a Court cannot, pursuant to its mandatory jurisdiction, direct the exercise of a judgment or

discretion in a particular way. *Casarino* v. *United States*, 413 F. 2d 775 (2d Cir. 1970).

Pursuant to Section 1361, one challenging the validity of his restraint must exhaust all available State or military remedies before seeking Federal collateral relief. *Angle* v. *Laird*, 429 F. 2d 892 (10th Cir. 1970), cert. denied 401 U.S. 918.

If the military violates its own regulations, with respect to a clear cut duty imposed by said regulations, mandamus must be issued to compel the officer of the United States to fulfill his obligations. *Vallechillo* v. *Davis*, 360 F. Supp. 896 (D.C. N.J. 1973).

Sicurella v. *United States*, 348 U.S. 385 75 S. Ct. 403 (1955)

This case involved a defendant who was a Jehovah's Witness claiming C.O.S. Sicurella stated he was willing to use force in defense of (Jehovah) Kingdom interests and brethren. However, he would not use weapons of warfare but he would try to ward off blows and attacks only in defense. The Board stated that while the defendant may be sincere in his beliefs, he had, however, failed to establish that he is "opposed to war in any form". The government argued that inasmuch as the defendant stated he would fight in defense of Kingdom interests, he was not "opposed to war in any form".

The Court sustained Sicurella's claim and said at page 390:

> "The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to participation in war."

The Court said at page 391:

"We believe that Congress had in mind real shooting wars when it referred to participation in war in any form — actual military conflicts between nations of the earth in our time — was with bombs and bullets, tanks, planes and rockets."

Gillette v. *United States*, 401 U.S. 437 91 S. Ct. 828 (1971)

Gillette distinguished *Sicurella* by pointing out that *Sicurella* referred to "theocratic war" commanded by Jehovah, therefore, it cannot be read in the same light with *Gillette*.

The Court said at page 447:

"Rather, we hold that Congress intended to exempt persons who oppose participation in all war — 'participation in war in any form' — and persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the later objection may have such roots in a claimant's conscience and personality that is 'religious' in character."

"A further word may be said to clarify our statutory holdings. Apart from abstract theological reservations, two other sorts of reservations concerning use of force have been thought by lower courts not to defeat a conscientious objector claim. *Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence towards other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such. See: E.g., United States* v. *Haughton*, 413 F. 2d 706, 736, 740-742 (CA 9 1969); *United States* v. *Carroll*, 398 F. 2d 651, 655 (CA 3 1968). But

surely willingness to use force defensively in the personal situations mentioned is quite different from willingness to fight in some wars but not in others." (Emphasis supplied)

At page 448, the Court said:

"Somewhat more apposite to the instant situation are cases dealing with persons who oppose participating in all wars, but cannot say with complete sincerity that their present conviction and existing state of mind are unalterable. See, E.g., *United States* v. *Owen*, 415 F. ed 383, 390 (CA 8 1969). Unwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the claimant's present sincerity or belief. At any rate, there is an obvious difference between present sincere objection to all war, and present opposition to participation in a particular conflict only."

Pertinent Parts of Transcript

The pertinent parts of the hearing transcript, pages 12-17 and page 35 are hereafter quoted inasmuch as reference has been made to these pages and they appear to be the basis for the hearing officer's determination denying C.O.S.

Pertinent Parts, Transcript Pages 12-17

Q: Would it be fair to characterize your position as being a pacifist, which has no direct dependence upon your religious training?

A: No.

Q: Would it be fair to characterize your position as a pacifist who advocates non-violent solutions?

A: It would not be fair to characterize my position as being a pacifist.

Q: What do you understand a pacifist to be?

A: A person who would do no violence under any circumstances.

Q: What is the position of a pacifist with respect to war?

A: It would be consistent with that, that he would do no violence even in war.

Q: Well, would you distinguish for me what you understand the difference to be between a pacifist and a conscientious objector?

A: I can say the difference between myself as a conscientious objector and what I understand a pacifist to be.

Q: All right.

A: If attacked, I would defend myself if no other — if no other means were available. I would not allow myself to be killed. If there were — if I were attacked by another human being who was, for instance, coming at me with a knife and I saw no other means of running away, of getting away, of talking him out of it, and I had the means available to me, I would kill him if that was the only possibility, rather than allow myself to be killed. I think a pacifist would not do that.

Q: Let's get involved with the distinction between a conscientious objection and a pacifist in respect to group effect. Supposing you were a member of a group and the group was attacked and you were the only one who had it within his means to repel and stop the aggressor?

A: Can you be more specific in terms of an example? It's hard for me to think of it in generalities.

Q: Let's assume you had a scalpel in your right —

A: A what?

Q: Let's assume you had a scalpel in your right hand and you're on a plane and somebody was going to blow up the plane. Call it a "hijacking". All right? And the man may — let's assume the man is threatening the entire planeload, and he is standing beside you within reach and you have it within your ability and means to prevent the hijacking and prevent the probable destruction of a planeload of human lives.

A: He is hijacking or he is going to blow up? He has the bomb?

Q: Both.

A: He has the gun?

Q: Both, Both.

A: If he is going to blow up and it is absolutely clear that my life is in mortal danger, I would kill him. If he was hijacking it, I would rather have to take a plane back from Cuba than to endanger his life.

Q: In other words, you would not hesitate to use fatal force — until your back is at the wall, so to speak — to prevent the infliction of death?

A: Could you repeat that?

Q: I take it you would refrain from using fatal force until your back is at the wall, in order to prevent the infliction of death?

A: So to speak. Yes, I mean so to speak to my back against the wall.

Q: What's your — would you have participated in World War II against the Nazis?

A: I wasn't alive in World War II, so I don't know.

Q: Well, I'm aware of that.

A: It's — yes — I mean at this point I wouldn't participate in any war anywhere unless —

Q: Would you answer my question? Would you have participated in World War II in an attempt to stop the expansion and the infliction of policies, which are well known and evidenced in your application, which the Nazis followed?

A: I wasn't alive then. I can't say what I would have done.

Q: Well, let's assume that Russia commenced a policy of a violent, forceful, external, geographical expansion which involves the use of arms. All right? And let's assume that in this policy of forceful expansion they embark upon a policy of extermination of all Jews. Would you bear arms against the aggressor?

A: If Russian troops landed on the shores of San Francisco — I am an American and, if attacked and — by a clear, definite enemy where there is no choice and no question that another human being is threatening me, my family, I would then bear arms.

Q: Now could you answer my question?

A: I'm not —

Q: I'm not telling you how to answer it. Will you answer my question:

HEARING OFFICER (TO REPORTER): Would you read back the question?

Q: Well, let me restate it to save you the trouble. If another country tomorrow commenced a policy, through violent action of aggressive conquering, to conquer the world and in that policy of external aggression announced and adhered to and evidenced and manifested a policy of exterminating Jews and any other ethnic group — let's stick to Jews — would you bear arms in an attempt to defeat that aggressor?

A: I would bear arms only if I were personally — my family or my country were definitely threatened by an obvious human aggressor.

Q: So is your — do I understand your answer to be "no"?

A: Unless American soil was threatened in a way that I could see, unless there —

COUNSEL FOR THE APPLICANT: Maybe I can — if I can ask a question, Commander?

HEARING OFFICER: Go ahead and ask it.

Questions by counsel for the applicant:

Q: Doctor Rosenfeld, if in fact the Russian army again invaded the Balkans and again invaded Austria and the countries of Eastern Europe, with their remaining Jewish populations, and stated an explicit policy of exterminating Jews, would you involve yourself in bearing arms against the Russians at this point?

A: No.

Questions by the hearing officer:

Q: At some point, I take it from your answers, you would bear arms?

A: If the physical shores of the country were attacked — if there were a clear, visible enemy — if my life and my family's lives were threatened.

Q: Well, what concerns me is your relying and taking a position based upon artificial national boundaries. Now where are you drawing the line based upon artificial national boundaries, whether it's — they land in Quebec, Mexico, California, or let's say, Long Island?

A: I can only — my belief is the taking of another — another human life is sacred, and the taking of that life —

Q: Well, I'm aware of that, but why don't you try and listen to my questions so you can answer them? You've indicated that at some point you would. And you indicated, if they landed in San Francisco on the territorial soil of the United States, you would — I think your indication was that you would at that point consider taking — bearing arms. Now

I'm asking you on what basis are you relying on this distinguishment of position based upon artificial national boundaries, where the policy remains the same and it could be geographically conceivably closer to your home and your family, even though it is not in the territorial soil of the United States?

A: Well, I believe that I can only bear arms when myself or my family is physically put in danger; and I think that is at the territorial boundaries of my country.

Q: And you would not think that the same policy which is being adhered to could — would put your family in danger — it's — as a condition to danger being imposed upon your family, there would have to be an invasion of the territorial sovereignty of the United States?

A: Until that point, I would try all other means to prevent that situation from arising.

Q: This again is based upon your personal standards and ideals?

A: As derived from Jewish morality and ethics.

COUNSEL FOR THE APPLICANT: Well, let me — let me interject something; and I think it should be on the record that it can be understood the consistence of what Doctor Rosenfeld is saying. When Doctor Rosenfeld, as do most applicants seek counsel from an attorney — as a Jew, he was shown court cases, et cetera, where conscientious objection is described for Jews; and there is a different set of criteria for Catholics and for various denominational sects of Protestants. So Doctor Rosenfeld, never having maintained he was a pacifist, did indeed corroborate his view with the law as he was asked to be shown it. So what I think he is saying — and I add this only for the sake of clarity — is that he does not posture as a pacifist. He postures as a Jewish conscientious objector. By that, he means, I think, that he cannot participate in war in any form or any sovereign, no matter what the boundaries, and would differ from a pacifist only in that he would permit

himself, as he understands Judaism — and, of course, he can best explain that — but he would permit himself, to preserve his own life, to do violence; and that, he has seen, is sufficient to fit within the ambit of the criteria for Jewish conscientious objection. In other words, he needn't be a pacifist to be a conscientious objector under that optional interpretation of Judaism. That's at least how I understood it; and that's how the case law was able to corroborate his view. It's probably better to have said that so that you can understand that he is not contriving this as if in fact he thinks he is "pulling any wool over anyone's eyes". He came saying this was his — this was his view and asked in fact whether that was acceptable under the laws of conscientious objection. He is not wrong if in fact this is not the law on conscientious objection; I am. This has always been his —

Pertinent Part of Transcript, Page 35

Q: In the hypothetical I gave you, let's assume that the country being aggressed against is the United States of America. Based upon your prior testimony, is it fair to say you would have no hesitation in participating in the armed services? In some capacity.

A: Can you specify what you mean by "the country being aggressed against is the United States?

Q: The other country is using the armed force.

A: Does that mean the troops would be landing?

Q: Yes.

A: Yes, I would defend myself.

Questions by counsel for the applicant:

Q: Would you be in the military?

A: No. But I would defend myself.

Discussion of Testimony

An examination of the pertinent sections of the testimony on which Copeland based his finding indicated that the petitioner stated that in the event of an invasion, he would defend "himself". He did not say he would defend the United States, nor did he say he would serve in the Armed Forces.

It appears from Copeland's finding of July 11, 1973, page 3 therefore, as follows:

> "2. The applicant admitted he would bear arms under certain circumstances. (Tr. 15)".

Examination of Tr. 15 reveals that this conclusion is not completely accurate.

At Tr. 16, petitioner answered: "Well, I believe that I can only bear arms when myself or my family is physically put in danger; and I think that is at the territorial boundaries of my country."

It appears to this Court that one statement without the review of the entire record does not justify, a conclusion that the petitioner would fight only in a selective war. The hypothetical questions were all answered with the conclusion that he would only fight if it meant the defense of himself or his family.

Once the petitioner had made a prima facie showing that he qualifies as a C.O. it is then the respondents burden to refute this claim.

Conclusion

On the basis of the foregoing, therefore, this Court concludes that there is a serious question as to whether there is

a "basis in fact" for Copeland's finding in view of the totality of the record, the briefs, and arguments of counsel. Clearly, this issue should not be determined in a Motion to Dismiss.

Therefore, it is recommended that:

(a) This motion be DENIED and this matter be reviewed by the District Judge and a factual finding be made on the merits.

(b) That an evidentiary hearing is unnecessary.

PETER W. PRINCI
UNITED STATES MAGISTRATE

N.B. Counsel have until September 13, 1974 to file objections to the within recommendations. Such objections shall be made to the District Judge and shall be accompanied by a short memorandum of law in support thereof.

INDEX

Cases:

	Page
Bates v. *Commander, First Coast Guard District*, 413 F. 2d 475	7
Clay v. *United States*, 403 U.S. 698	6
Estep v. *United States*, 327 U.S. 114	7
Ferrand v. *Seamans* 488 F. 2d 1386	7
Gillette v. *United States*, 401 U.S. 437	8
Scott v. *Commanding Officer*, 431 F. 2d 1132	6
United States v. *Broyles*, 423 F. 2d 1299	6
United States v. *Curry*, 410 F. 2d 1297	7
United States v. *Orr*, 474 F. 2d 1365	7
United States v. *Shomock*, 462 F. 2d 338	6
United States ex rel. Donham v. *Resor*, 436 F. 2d 751	7
United States ex rel. Trainin v. *Cain*, 144 F. 2d 944	7
Witmer v. *United States*, 348 U.S. 375	6

Statute:

50 U.S.C. App. 456(j)	6–7

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1605

LT. ALVIN A. ROSENFELD, M.D., PETITIONER

v.

REAR ADMIRAL RICHARD E. RUMBLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that his answer to an allegedly tainted hypothetical question improperly constituted the sole basis in fact for the denial of his discharge from military service as a conscientious objector.

On February 21, 1974, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts, seeking discharge from the United States Navy Reserve as a conscientious objector. Upon consideration of the government's substitute motion to dismiss the petition, the United States Magistrate found that "there is a serious question as to whether there is a 'basis in fact' * * *

in view of the totality of the record * * *'" (Pet. App. 52–53). The magistrate therefore concluded that the issue whether there was a basis in fact for the denial of the discharge should be determined by the district court on the merits. On December 10, 1974, the district court granted the government's motion to dismiss, finding a basis in fact for the denial of the discharge (Pet. App. 19–30). The court of appeals affirmed (Pet. App. 13–17).

1. The pertinent facts are not in dispute. In March, 1971, petitioner accepted a commission in the United States Navy pursuant to the "Berry Plan," a deferred entrance program for physicians who enter specialty residence training. Petitioner incurred a six-year reserve and two-year active duty obligation. At the conclusion of his residency in the summer of 1974, petitioner was scheduled to commence active duty.

On February 28, 1973, petitioner filed an extensive application for discharge as a conscientious objector, reciting therein that he was "of the belief that all warfare is amoral." The cornerstone of petitioner's rejection of violence "as a means to any end, save self-preservation" centered in large part upon his acute awareness of the atrocities perpetrated against Jewish people generally, and more particularly his own family, in Nazi Germany. Petitioner stated: "I reserve the use of violent force for self-preservation. * * * What I * * * deny is that violence must be resorted to as a method of resolution of conflict man to man. Resolution must come about by an exercise of toler-

ance and reason and the implementation of the ethic of charity in every conflict."[1]

On March 29, 1973, petitioner was interviewed by a Navy chaplain, who concluded that there was no reason to doubt petitioner's sincerity. On March 30, 1973, petitioner was interviewed by three psychiatrists, who found that "the mental status examination [of petitioner] was within normal limits for a man of his background and station in life." (See Pet. 4.)

On May 24, 1973, a hearing was held on petitioner's application for discharge as a conscientious objector. At the hearing, petitioner, who was represented by counsel, emphasized that he was not a pacifist, in that he would defend himself from attack if he "saw no other means * * * available" (Pet App. 46). Petitioner stated that his conscientious objection to war stemmed from the moral and ethical teachings of the Jewish faith.

During the course of the proceedings, petitioner twice stated that he could not say whether or not he would have participated in World War II.[2] The hear-

[1] Petitioner's application was supplemented with twenty-one letters from rabbis, professional colleagues and close friends. All attested to petitioner's sincerity (Pet. App. 20).

[2] The text of this colloquy follows (Pet. App. 47–48):

"Q. What's your—would you have participated in World War II against the Nazis?

"A. I wasn't alive in World War II, so I don't know.

"Q. Well, I'm aware of that.

"A. It's—yes—I mean at this point I wouldn't participate in any war anywhere unless——

"Q. Would you answer my question? Would you have participated in World War II in an attempt to stop the expansion

ing officer thereupon posited the following hypothetical question (Pet. App. 48):

> Q. Well, let's assume that Russia commenced a policy of a violent, forceful, external, geographical expansion which involves the use of arms. All right? And let's assume that in this policy of forceful expansion they embark upon a policy of extermination of all Jews. Would you bear arms against that aggressor?
> A. If Russian troops landed on the shores of San Francisco—I am an American and, if attacked and—by a clear, definite enemy where there is no choice and no question that another human being is threatening me, my family, I would then bear arms.

Petitioner stated further: "I would bear arms only if I were personally—my family or my country were definitely threatened by an obvious human aggressor" (Pet. App. 48). The hearing officer subsequently inquired whether the use of force was limited to invasions which were physically proximate to petitioner and his family, or whether petitioner would bear arms to resist an invasion of any physical boundary of the country. Petitioner responded: "Well, I believe that I can only bear arms when myself or my family is physically put in danger; and I think that is at the territorial boundaries of my country" (Pet. App. 50).

On July 11, 1973, the hearing officer issued his report recommending denial of petitioner's applica-

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and the infliction of policies, which are well known and evidenced in your application, which the Nazis followed?

"A. I wasn't alive then. I can't say what I would have done."

tion for a discharge as a conscientious objector. He concluded that petitioner was not opposed to participation in war in any form under all circumstances.[3] The Commandant of the First Naval District concurred in the recommendation to deny the application,[4] and on September 28, 1973, the Chief of Naval Personnel rejected petitioner's application and found that petitioner "[is] not opposed to participation of any kind in war in any form" (Pet. App. 23).

The petition for a writ of habeas corpus was filed to review this final administrative determination.

2. Petitioner is incorrect in contending that his answer to a question that he believes was improper provided the sole basis in fact for denial of his application for discharge as a conscientious objector.

One seeking classification as a conscientious objector is required to satisfy three basic tests. He must

[3] The hearing officer stated:

"I am unpersuaded by the preponderance of the credible evidence that there were any developments which occurred subsequent to the applicant's acceptance of his commission and taking of the oath which can reasonably explain and be a basis for the existence of a true conscientious objector which did not exist prior to his entry into the service. It is my conclusion that, even if it were to be assumed that the applicant is a true conscientious objector within the meaning of 50 U.S.C., Section 6(j), it existed prior to his entering the military service" (from Commander Copeland's Report to the Commandant, containing his findings regarding petitioner's applicaton, dated 11 July 1973, p. 3).

[4] The Commandant upheld the hearing officer's view that petitioner "does not hold a sincere objection to participation in war in any form or to the bearing of arms" (Pet. App. 23).

demonstrate (1) sincere opposition (2) to participation in war in any form, (3) based upon religious training and belief, as the term has been construed in this Court's decisions. *Clay* v. *United States,* 403 U.S. 698, 700. See also *Witmer* v. *United States,* 348 U.S. 375; *United States* v. *Shomock,* 462 F. 2d 338 (C.A. 3); *Scott* v. *Commanding Officer,* 431 F. 2d 1132 (C.A. 3); *United States* v. *Broyles,* 423 F. 2d 1299 (C.A. 4). As the district court observed (Pet. App. 25), there is no question that petitioner is sincere or that his opposition to war is based upon his religious beliefs. The only question is whether those beliefs truly constitute an opposition to participation in "war in any form."

In resolving this question, the hearing officer relied upon petitioner's refusal to answer whether he would have participated in World War II. See note 2, *supra.* Petitioner's candid inability to state whether, consistent with his beliefs, he would have participated in World War II—an inability to respond, not to a hypothetical question, but to definite and known circumstances of obvious relevance to the question of his classification—is wholly inconsistent with the opposition to participation in war in any form that petitioner was required to demonstrate. One actually opposed to participation in war in any form could have answered the question. This factor, relied upon by the hearing officer, constitutes a sufficient basis in fact for the conclusion that petitioner was not a conscientious objector within the meaning of the statute, 50

U.S.C. App. 456(j).[5] See, *e.g.*, *United States* v. *Curry*, 410 F. 2d 1297 (C.A. 1). Thus, contrary to petitioner's assertion, his answers to the allegedly tainted hypothetical question (see *supra*, p. 4) did not constitute the sole basis in fact for the denial of his application for discharge as a conscientious objector.

The courts below concluded that petitioner's willingness to bear arms in the event of an attack by a foreign aggressor within the territorial boundaries of the United States was a sufficient basis in fact for the denial of his application for discharge as a conscien-

[5] Judicial review in Selective Service classification cases generally (*Estep* v. *United States*, 327 U.S. 114, 122–123; *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C.A. 2)), and conscientious objector cases in particular (*Ferrand* v. *Seamans*, 488 F. 2d 1386 (C.A. 2); *Bates* v. *Commander, First Coast Guard District*, 413 F. 2d 475, 477 (C.A. 1)), is limited to the question whether there is a "basis in fact" for the decision reached by the draft board or, as in this case, the commanding officer. As the district court noted, some courts "have referred to this type of review as the 'narrowest known to the law.' *Blalock* v. *United States*, 247 F. 2d 615, 619 (4th Cir., 1957). *See*, *Cohen* v. *Laird*, 315 F. Supp. 1265, 1271 (D.S.C., 1970), aff'd., 439 F. 2d 866 (4th Cir., 1971)" (Pet. App. 24). While this standard permits courts to strike down unsupported and conclusory determinations of an official or board, at the same time it serves the salutary purpose of precluding the courts from sitting as *de novo* tribunals. *United States* v. *Orr*, 474 F. 2d 1365, 1368 (C.A. 2). Accordingly, if there is objective evidence in the administrative record showing that the applicant has not met all of the requirements that would establish a conscientious objector claim, even though this evidence is not preponderant or substantial, the finding must be sustained. *United States ex rel. Donham* v. *Resor*, 436 F. 2d 751, 753 (C.A. 2). See Pet. App. 24.

tious objector.[6] Petitioner assails this reliance upon his responses to a hypothetical question which he believes was improper because it added to the question of a territorial attack by a foreign aggressor the element of extermination of Jews as an object of the aggression. Since the nature of the hypothetical question derived

[6] "Willingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community, has not been regarded as inconsistent with a claim of conscientious objection to war as such." *Gillette* v. *United States*, 401 U.S. 437, 448. The district court, on whose opinion the court of appeals principally relied (Pet. App. 14), recognized this principle, but concluded that petitioner's willingness to bear arms was not dependent upon geographical proximity or the imminent threat of violence (Pet. App. 26–27). Petitioner had stated that he would bear arms to protect himself, his family and his country if an obvious human aggressor attacked the United States. In this regard, the court of appeals observed (Pet. App. 15–16):

"We are not insensitive to the genuineness of appellant's feeling that he would look upon an invader bent on extinguishing his co-religionists in this country as an immediate threat to his 'family,' extended and nuclear. There is recent history to back him up. But if exemption is given appellant for this reason, must not it also be given a Mormon, a Seventh Day Adventist, or to hark back to the Crusades, any professed Christian, if the invader be 'infidel'? These hypothetical cases are of course quickly distinguished by their lack of verisimilitude—they are fantasies, whereas the holocaust was real. The existence of such an historical background is highly relevant on the issue of sincerity. But to allow it to be used to define the parameters of a person's family or community, so that fighting in defense of the country can be equated with defense of self and family, seems to us an irrational basis or distinction. For example, a patriotic humanist, believing in no God but deeply believing that the nation is his 'family', would not, despite the intensity of his view of community, be entitled to his definition for purposes of qualifying as a conscientious objector." (Footnote omitted.)

from petitioner's inability to state whether he would have participated in World War II, it was not improper. The court of appeals rejected petitioner's claim, stating (Pet. App. 16–17):

> The contention is that the injection into hypothetical questions of the assumption that a foreign invader would be bent on extermination of all Jews placed an unfair burden on appellant. Appellant calls these "loaded" questions. While we are not obligated to deal with this new issue, we do so in view of its nature. For if we were convinced that appellant had been lured by trickery on to treacherous ground, we would not take refuge in a procedural shelter. And it may well be that the effort to imagine honestly one's response to the hypothetical situation described is unique for a group that had in recent history a real experience. Had the hearing officer devised the question out of thin air, that is, just because appellant was of Jewish background and faith, we would be troubled. But a substantial, if not the major, thrust of appellant's seventy-page application for discharge was directed to his reflections over the enormity of the Nazi persecutions. Under these circumstances it was natural for the hearing officer to refer to this background in exploring the position of appellant. We are aware of the atmosphere of unreality created by hypothetical questions. Yet the Congressional mandate of "participation in war in any form" leaves no alternative to probing. Our view of the record reveals no indication of perverse imagination or exploitation by

the hearing officer. Indeed, counsel for appellant pursued the same line of inquiry, obviously deeming it both relevant and fair at the time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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